United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Signed

No. 74-2005 **74-2005**

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ESTATE OF SUMNER GERARD, CHEMICAL BANK NEW YORK TRUST COMPANY, C. H. COSTER GERARD, SUMNER GERARD, JR., JAMES W. GERARD, II, Executors,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
GARY R. ALLEN,
WYNETTE J. HEWETT,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530.

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STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court correctly found that the decedent's transfer to his sons of 51 shares of stock in his wholly owned corporation two years and two months prior to his death, constituted a gift in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

This appeal involves a deficiency in federal estate taxes as determined by the United States Tax Court in the amount of $832,978.93. (R. 310.)[1/] On June 9, 1967, the executors of the estate of Sumner Gerard filed an estate tax return and paid the $1,450,050.99 shown due on that return. (Resp. Ex. A.) On October 1, 1969, the Commissioner of Internal Revenue mailed to the executors a notice of deficiency in the amount of $4,111,906.38. (R. 3.) Taxpayer filed a petition in the Tax Court for the redetermination of this deficiency on November 7, 1969. (R. 1.) The Tax Court (Judge Quealy) filed findings of fact and conclusions of law on March 13, 1972, reported at 57 T.C. 749, in which it found that the transfer of certain shares of corporate stock constituted a gift in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code of 1954. (R. 281-309.) The decision of the Tax Court was entered on April 15, 1974. (R. 2.) Taxpayer filed a notice of appeal on July 12, 1974. (R. 2.) Jurisdiction of this Court is invoked under Section 7482 of the Internal Revenue Code of 1954.

The facts relevant to this appeal, as found by the Tax Court are as follows:

On January 2, 1964, two years and two months prior to his death, the decedent transferred to each of his three sons 17 shares of Aeon Realty Company stock, all 108 shares of which had

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1/ "R." references are to the separately bound appendix.

been owned theretofore by the decedent. (R. 282, 294.) Aeon, a New York corporation, held real property located in Manhattan and the surrounding areas. (R. 293.) The decedent retained the controlling interest in Aeon. (i.e., the remaining 57 shares), until his death on March 10, 1966. (R. 294.) The stipulated value of the transferred shares on the date of decedent's death was $2,090,796 ($40,996 per share x 51 shares). (R. 29.)

At the time of the transfer the decedent was 89 years of age. In 1959, four years prior to the questioned transfer, he had suffered a gall bladder attack which required two operations and resulted in a long period of recuperation. In the period immediately preceding the transfer, he was suffering from emphysema, chronic bronchitis, periodic prostate infections, as well as cataracts. None of these illnesses were such that they would cause his death within a predictable period of time. However, after 1961, the emphysema forced him to be confined to his home. Further, he required the care of a nurse. (R. 295.) In 1962, the decedent expressed a fear of having a stroke, and in 1963, he experienced abdominal pains and expressed a fear of having cancer. In May of 1963, as a result of x-ray tests, he was advised that he did not have abdominal cancer. (R. 296.) Thereafter, in a letter to his physician dated September 26, 1963, he wrote:

> I am still hanging on but my condition is now such that I fear it requires the expert medical know-how of your good self. (R. 280, 296.) ***

He died on March 10, 1966, following his hospitalization for an intestinal obstruction. (R. 297.)

Prior to the transfer of stock in 1964, here in issue, the decedent made few gifts. In 1935, he made certain gifts in trust for the benefit of his sons, and each Christmas he customarily gave each son a $25 check. He also gave each grandchild approximately $1,500 per year. Following the transfer of Aeon stock, the decedent made two other transfers. On April 27, 1964, he gave his three sons mineral interests in Alabama property valued at $6,883.33 each. On August 27, 1965, he gave his sons interests in Texas property valued at $21,987.33 each.[2/] (R. 297.) The principal provision of the decedent's will created a trust which named the sons and their families as income beneficiaries. (R. 307.)

During the period preceding the transfer of the Aeon stock, the decedent's son, Sumner Gerard, Jr. (hereinafter Jerry Gerard), had discussed his financial problems with the decedent. (R. 292.) In 1960, Jerry Gerard waged an unsuccessful campaign for the United States Senate at a personal cost of $20,000. (R. 289.) He had also expended substantial sums for the education of his five children. In 1962, these expenses totaled $10,279.75; in 1963, they totaled $12,770.60. (R. 290.) Jerry Gerard obtained loans from various banks, as well as from a family corporation, the Ennis Company, to defray his personal expenditures. By December 31, 1963, such loans totaled $167,563. (R. 292.)

2/The Commissioner found that these transfers, as well as the transfers of the Aeon stock, constituted gifts in contemplation of death within the scope of Section 2035 of the Internal Revenue Code of 1954. (R. 7.) Taxpayer chose not to contest the determination as to the Alabama and Texas properties at trial below.

During this period Jerry Gerard's principal sources of income were the Ennis Company, Yellowstone Feed and Cattle Company, his salary as a member of the Montana State Senate, a trust created in 1935 by his father, securities which he received as a legatee of Mary D. Gerard's estate, as well as a considerable amount of other securities. (R. 284-287, 288, 289, 291.) Jerry Gerard's federal income tax returns for the years 1959 through 1963 reflected the following amounts of income (exclusive of net capital gains and losses) (R. 290):

1959	$19,506
1960	$31,759
1961	$23,176
1962	$29,298
1963	$25,494

In addition, during the same period, he received distributions of marketable securities from the Estate of Mary D. Gerard, totaling $55,161. (R. 291.)

The Ennis Company, which operated a ranch run as a live stock operation, was owned by Jerry Gerard and his wife (1,320 shares) and by the decedent (2,680 shares). (R. 284.) The ranch operated at losses from 1959 to 1963, ranging from $4,272.14 to $121,651.01. (Since the Ennis Company was a "Subchapter S" Corporation, these losses were reported on the individual income tax returns of Jerry Gerard and the decedent). (R. 284, 285.) During this period, the Ennis Company's loan balance with the Metals Bank and Trust Co. of Butte, Montana, increased from $157,749.04 at the end of 1959 to $300,269.04 at the end of 1963. These loans were secured by the Ennis Company's livestock as well as by marketable securities owned by decedent and by Jerry Gerard

and his wife. (R. 286-287.) Jerry Gerard and his family lived on the ranch rent free; the ranch employees performed personal services for them, and the airplane owned by the ranch was available for personal use. (R. 291.)

Jerry Gerard owned a 50% interest in Yellowstone Feed and Cattle Company. A revolving line of credit, which he was required to personally guarantee, was used to finance the business. While the company reported small profits in 1961 and 1962, it reported a loss of $89,062.29 in 1963. (R. 288.) To obtain further financing the company liquidated some of its inventory and increased its indebtedness for feed and supplies, and Jerry Gerard contributed an additional $51,000 to the corporation's capital. (R. 289.)

During 1963, Mr. Hugh Galusha, a financial advisor of Ennis Company and a friend of Jerry Gerard as well as the decendent, told the decedent that Jerry Gerard need a "transfusion of capital" and that Ennis was unable to support additional loans. Sometime after receiving this advice, the decedent told Mr. Galusha that he was going to transfer shares of Aeon stock to Jerry Gerard and make equalizing transfers to his other sons. (R. 293.) The decedent expressed concern about the one million dollar gift tax liability, but obtained a loan from Chemical Bank to satisfy that liability. (R. 293.)

After receipt of the Aeon stock, Jerry Gerard forwarded it to Chemical Bank on July 10, 1964, as collateral for a loan, to

provide funds for educational purposes, but advised the Bank that he had "no immediate need for the funds * * *. (R. 294-295.) However, shortly thereafter he did begin to borrow against the collateral, but such loan never exceeded the total amount of $70,000. (R. 295.)

The Tax Court found that, while Jerry Gerard may have been in need of financial assistance, such assistance was not the decedent's dominant motive in making the transfer of Aeon stock. The Tax Court found, based on the decedent's age, the condition of his health, and the testamentary nature of the gifts, that the transfer of Aeon stock to decedent's three sons was a gift in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code of 1954. (R. 298-309.) From this finding, taxpayer here appeals.

SUMMARY OF ARGUMENT

Section 2035 of the Internal Revenue Code of 1954 requires the inclusion in the gross estate of a decedent, for federal estate tax purposes, of "the value of all property * * * of which the decedent has at any time made a transfer * * * in contemplation of his death." If the transfer occurs within three years of the decedent's death, then "unless shown to the contrary [it shall] be deemed to have been made in contemplation of death." At 89 years of age, two years and two months prior to his death, the decedent transferred to his sons stock valued in excess of two million dollars. The sole question in this case is whether the transfer was in contemplation of death within the meaning of Section 2035 as the Tax Court found.

It is settled that whether an inter vivos gift by a decedent was made "in contemplation of death" within the purview of Section 2035 depends on whether "life" or "death" motives constituted the dominant reason for the gift. The estate has the burden of establishing that "life" motives dominated. Moreover, since the question is clearly one of fact, the findings of the Tax Court must be sustained unless they are clearly erroneous. Far from being clearly erroneous, as the taxpayer contends, the Tax Court finding that motives associated with death dominated has solid evidentiary support, the transfer was made at a time when the decedent was in poor health. He was suffering from emphysema,

bronchitis, a prostate condition, and cataracts. He was confined to his home and required the care of a nurse. Moreover, had no established life time policy of gift making. Other than Christmas gifts to his sons, he had made only one previous transfer; in 1935, he created a trust for his sons' benefit. The transfer of stock in equal portions to each of his three sons was in accord with the decedent's testamentary plan.

The taxpayer argues that the dominant motives for the transfer of stock were to provide financial assistance to one son, and to promote family harmony by making equalizing transfers to the other two sons. Although the taxpayer urges that the decedent's son was in a financial crisis due to an immediate need for cash, after he received the stock, the son advised the bank which was holding the stock that he had no immediate need for funds. He first borrowed against the collateral seven months after he received it, and the loans never exceeded $70,000. Moreover, the decedent's statements concerning his son indicate that he was not unduly alarmed about his son's financial condition. And, as the Tax Court finally noted, the stock of the closely held Aeon Realty Company was not a particularly suitable vehicle for satisfying the life motives asserted by taxpayer, but was, indeed, an asset which would be the most desirable for the decedent to remove from his taxable estate. Under these circumstances, the Tax Court's finding that the gift of 51 shares of stock valued in excess of two million dollars, by a decedent then in ill health and of advanced years constituted a gift in contemplation of death cannot be said to be clearly erroneous and should not be disturbed on appeal.

ARGUMENT

THE TAX COURT CORRECTLY FOUND THAT THE TRANSFER OF CERTAIN SHARES OF STOCK WAS A GIFT IN CONTEMPLATION OF DEATH

Two years and two months prior to his death, at the age of 89, the decedent gave 51 shares of Aeon Realty Company stock valued at $2,090,796 to his sons. (R. 298.) The Tax Court found that this transfer constituted a gift in contemplation of death within the meaning of Section 2035 of the Internal Revenue Code of 1954, Appendix, infra.

> The value of the gross estate shall include the value of all property * * * which the decedent has at any time made a transfer (except in case of a bona fide sale * * *), * * * in contemplation of his death.

The section further provides that a transfer made within three years of death "shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section."[3/] The purpose of the provision is to prevent evasion of the estate tax and to reach substitutes for testamentary disposition. Milliken v. United States, 283 U.S. 15, 20 (1931); Vanderlip v. Commissioner, 155 F. 2d 152, 154 (C.A. 2, 1946).

3/ By the same token, Section 2035(b), also provides that gifts made prior to three years before the date of the decedent's death shall not be treated as having been made in contemplation of death under any circumstances.

The meaning of the phrase "in contemplation of his death," is not restricted to a fear that death is imminent. United States v. Wells, 283 U.S. 102, 117 (1931); Treasury Regulations on Estate Tax (1954 Code), § 20.2035-1(c) (Appendix, infra). Rather, death must be contemplated simply in the sense that the motive which induces the transfer must be of the sort which leads to testamentary disposition. Wells, p. 117.

The decedent's motive was, thus, the central issue to be resolved by the fact finder. Wells, p. 117; English v. United States, 270 F. 2d 876, 881 (C.A. 7, 1959). That issue is to be resolved by viewing all the facts and circumstances surrounding the transfer. Bradley v. Smith, 114 F. 2d 161, 164 (C.A. 7, 1940). See also § 20.2035(c) of the Treasury Regulations, supra. As the Supreme Court stated in Wells, p. 119:

> There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in light of his bodily and mental condition, and thus give effect to the manifest purpose of the statute.

As the Tax Court noted (R. 300), it was incumbent upon taxpayer not only to overcome the statutory presumption of Section 2035(b), but also to carry the customary burden of proof with respect to the Commissioner's determination. In short, the estate had the burden of establishing that the dominant motive for the transfer was associated with life. Reeve's Estate v. Commissioner, 180 F. 2d 829, 831 (C.A. 2, 1950), cert. denied 340 U.S. 813 (1950); First Trust and Deposit Co. v. Shaughnessy, 134 F. 2d 940, 941 (C.A. 2, 1943), cert. denied 320 U.S. 744 (1943).

And contrary to the apparent thrust of taxpayer's contentions (Br. 25), it is not sufficient merely to show that some of the testimony in the record might support a conclusion, other than that reached by the fact finder. See McIntosh's Estate v. Commissioner, 248 F. 2d 181, 184 (C.A. 2, 1957); Buckminster's Estate v. Commissioner, 147 F. 2d 331, 335 (C.A. 2, 1944). Since the question of motivation is plainly one of fact, the findings of the Tax Court must be sustained unless "clearly erroneous." Commissioner v. Duberstein, 363 U.S. 278 (1960).

Having failed to persuade the fact finder that the decedent's dominant motivation was associated with life, taxpayer here seeks, in effect, a trial de novo on this factual issue, arguing that the weight of the evidence supports his position. (Br. 26-49.) But while there was no doubt some evidence that decedent was concerned with Jerry Gerard's financial condition, that evidence, we submit, was far from being so overwhelming in view of the surrounding circumstances as to compel a finding that such a concern was the dominant motivating factor behind the transfer in question. On the contrary, viewing all the surrounding circumstances, it cannot be said that the Tax Court's finding that this was a gift in contemplation of death is "clearly erroneous."

A. Financial assistance to his son was not the decedent's dominant motive in transferring the shares of Aeon stock

The taxpayer argues that decedent's dominant motives for the transfer of Aeon stock worth $2,090,796, were to provide financial assistance to his son, Jerry Gerard, and to preserve family harmony by making equalizing transfers to his other two sons. (Br. 23.) In the taxpayer's view, Jerry Gerard was in a financial crisis because: educational expenses were creating an immediate need for funds; Ennis Company could not incur additional debt; Yellowstone Feed and Cattle Company was on the brink of collapse, and his ability to provide security for additional loans was exhausted. (Br. 44-45.) However, taxpayer does not argue that Jerry Gerard was in any sense insolvent, but rather that he was simply short of cash. (At trial, counsel stated to the court that taxpayer wished to show without regard to Jerry Gerard's net worth that he was short of cash (R. 123), and Jerry Gerard testified that his finanical problem was simply an increased need for cash (R. 108).)

To the extent that his son's involvement in Yellowstone Feed and Cattle Company produced a cash short position 1963, the decedent provided the necessary means of securing funds prior to the transfer here in issue. As recognized by the taxpayer (Br. 32-33), the decedent provided additional collateral to the Ennis Company in March of 1963, which permitted the release of his son's securities, which were then utilized in the Yellowstone enterprise. (R. 181-182, 263, 264, 265, 269.)

With regard to the capacity of Ennis Company to incur additional debt in 1963, the decedent continued the practice of advancing collateral to Ennis Company (R. 181-182), which in turn permitted his son to obtain personal loans from Ennis. As taxpayer recognizes (Br. 32), the decedent realized a dual advantage in using this method of giving his son financial assistance: it provided his son with funds and provided him a tax deduction. However, the decedent's motives with regard to the financing of Ennis Company are simply not in issue here. Rather, what is at issue is his motivation for the transfer of Aeon stock to his three sons.

The most persuasive evidence of the relationship between Jerry Gerard's cash flow problem and the gift of Aeon stock was his disposition of the stock after he received it. He placed the stock with Chemical Bank for the declared purpose of obtaining an educational loan. (R. 172.) While taxpayer argues that he had an immediate cash problem, he then wrote a letter to the bank stating, "I have no immediate need for the funds * * *." (R. 274.) Moreover, he did not utilize the stock as collateral for a loan until seven months after he received it.[4/] (R. 276.)

4/ The Tax Court found (R. 303) that the maximum amount borrowed on this collateral was about $70,000. Taxpayer, however, asserts (Br. 18) that the amount borrowed from Chemical Bank by Jerry Gerard eventually reached as high as $140,000. While this is true, they fail to indicate that this higher amount was not reached until after additional collateral had been pledged on the loan. (Tr. 257-258, R. 206-207, 270-272.) The Tax Court's findings in this regard are, thus, not in conflict with the record.

Finally, it is the decedent's attitude, not his son's financial condition which is in issue here. Yet, by far the greater proportion of taxpayer's evidence was directed at Jerry Gerard's actual cash flow problems, and not the decedent's state of mind in this regard. True, Mr. Galusha, a financial adviser in the Ennis Company, did testify that he had visited the decedent and discussed Jerry Gerard's financial problems. But, in response to Mr. Galusha's concern that Jerry Gerard's family was going "down the drain," the decedent explained his philosophy concerning borrowing against property, and that it was his practice to keep his own securities pledged as collateral for loans. (R. 145-147.) Under these circumstances, the fact that his son had a considerable amount of outstanding loans did not alarm the decedent. Indeed, reading Mr. Galusha's testimony in context, it was he who was far more concerned about Jerry Gerard's financial problems; the decedent, in sharp contrast, seemed satisfied with his son's financial situation. As Mr. Galusha himself testified decedent stated to him (R. 147):

> * * * I have faith that Jerry will be able to do it. He has the ranch under control, * * *. He has other kinds of investments going, and some of them are going to pay off.

In short, there is little doubt on the record that Jerry Gerard was having cash flow problems in the sense that his personal expenses consistently exceeded his income. What remains substantially in doubt, however, is whether concern for

such financial problems actually constituted the compelling motive for the decedent's transfer of the $2,000,000 worth of stock in issue, and the Tax Court, we submit, was hardly in error in finding (R. 304-305) that taxpayer's evidence in this regard was of little probative value in light of the other surrounding circumstances.

Indeed, as the Tax Court noted (R. 308-309), the stock of the closely held Aeon Realty Company was hardly a suitable vehicle for accomplishing the massive transfusion of capital which taxpayer argues was the dominant motive for the transfer. And while the evidence does show that such stock was capable of supporting loans for the education of Jerry Gerard's children, the value of the stock transferred was substantially disproportionate to the relatively modest amount of funds which could be obtained in this manner. As the Tax Court further noted (R. 308-309), the transfer of such stock in a closely held corporation, remaining in the control of the decedent, is far more desirable for testamentary and estate tax purposes[5/] than, for example, the transfer of marketable securities (which by contrast, would have been far more appropriate to fulfill the life purposes asserted here by taxpayer).

5/ In their statement of facts herein, taxpayer asserts that Mr. Galusha testified that the question of payment of Federal estate tax * * * never concerned decedent very much. (Br. 22.) In fact, however, Mr. Galusha's testimony is to a rather different effect (R. 152):

> He was concerned, obviously, your honor, about the amount of the estate tax that would be involved, but the only concern he had about which he was vocal to me was where was the money coming from to pay the gift tax. Who would pay the estate tax never concerned him very much. (Emphasis Supplied.)

Nor is there any other evidence on the record which would indicate that decedent was not in fact concerned with estate taxes, as taxpayer alleges.

B. The record fully warrants the finding that the decedent transferred the Aeon stock in contemplation of his death

Even if the Tax Court had found the evidence on the issue of financial assistance probative, it would not dictate the conclusion that this was the dominant motive for the transfer in question. A decedent may have several motives associated with a particular transfer. See, for example, McClure v. Commissioner, 56 F. 2d 548 (C.A. 5, 1932); Kroger's Estate v. Commissioner, 145 F. 2d 548 (C.A. 6, 1944); Estate of Hite v. Commissioner, 49 T.C. 580 (1968); Estate of Ridgely v. United States, 67-2 U.S.T.C., par. 12,481 (Ct. Cl., 1967). Which of the motives is dominant or impelling is a question of fact. Allen v. Trust Co. of Georgia, 326 U.S. 630 (1946); Humphrey's Estate v. Commissioner, 162 F. 2d 1, 2 (C.A. 5, 1947), cert. denied, 332 U.S. 817 (1947).

A broad range of factors has been considered relevant to the question of dominant motivation in this regard, including inter alia, the age of the decedent at the time of the transfer, the health of the decedent, as he knew it, at the time of the transfer, the relationship of the transfer to the decedent's testamentary plan, and the existence, vel non, of an established gift giving pattern on the part of the decedent. See e.g., Estate of Johnson v. Commissioner, 10 T.C. 680 (1948).

Considering such factors as decedent's advanced age, his poor health, his general testamentary plan, his lack of a prior pattern

of gift giving, and his subsequent gifts of property to his sons (R. 305-208), the Tax Court had ample basis for concluding that the transfer in question was made in contemplation of death within the meaning of Section 2035. Of course, it may be as taxpayer contends (Br. 41), that such factors as age or poor health, standing alone, may not necessarily be controlling on the fact finder where there is a strong showing that the decedent was motivated primarily by purposes associated with life. But, far from being immaterial, they are clearly among the most significant factors to be considered by the fact finder. See United States v. Wells, supra; § 20.2035-1(c) of the Treasury Regulations, supra. Nor can such factors be fairly characterized as merely "neutral" as taxpayer asserts. (Br. 26, 42.) Taken in conjunction with all the surrounding circumstances, they provide substantial support for the Tax Court's ultimate finding as to decedent's motivation.

Taxpayer seeks to minimize (Br. 42-43) the Tax Court's finding (R. 305) that the decedent was not in good health at the time of the transfer. Yet he was suffering at that time from emphysema, chronic bronchitis, a prostate condition, and cataracts. (R. 187-188.) His conditions resulted in his being confined to his home. (R. 196-197.) His prostate condition affected his kidneys and bladder, made him uncomfortable, and at times caused a fever. (R. 196.) While none of his conditions were such that

they would cause death within a predictable period (R. 189), the decedent was fearful of the development of more serious conditions. He had expressed fear of having a stroke (R. 195) as well as fear of having cancer (R. 194). The decedent summarized his own state of health on November 4, 1963, in a letter to an eye specialists concerning an examination and potential operation for his cataract condition (R. 279):

> I am 87 years old give or take a year * * *. For the last year or two my urinary machinery has gone on the blink. * * *
>
> Finally, I suffer from emphysema to such an extent that the nurse has to help me to go to the bathroom and afterwards go to the front room where I sit in an easy chair before the TV and radio.
>
> Now, to come to the eyes. During most of the night the eyeballs are painful. * * * To go to the hospital is an ordeal and requires the hlep [sic] I get from a trained nurse who has attended to me for several years. * * *

In a letter to his physician the decedent wrote (R. 280):

> I am still hanging on but my condition is now such that I fear it requires the expert medical know-how of your good self. My internal pipes are on the blink and the ability to urinate at night is becoming more and more difficult and tedious. * * *
>
> * * *
>
> When the trained nurse comes about half past eight in the morning she helps me into the bathroom * * * and my day begins when I get into a chair in the front room and then I am hardly bothered a bit until evening comes which I contemplate with apprehension.
>
> * * * A major operation at my age is risky.

Nor does the testimony of the decedent's physician (R. 192) compel a different finding. In the first place, it is not so much the decedent's actual health, as his own views as to the state of his health which is material to the question of his motivation in making the transfers in question. And while his physician testified that none of decedent's illnesses would have caused death within a predictable period, it is not essential, as we noted above, that the gift be made with the thought that death is imminent and the physician admitted that decedent could be said to have only a limited life expenctancy when the gifts were made. (R. 190.) Indeed, his testimony as to decedent's condition was extremely guarded at best--e.g., that it was, "as good as you could expect for a man of his age with the illnesses that he had." (Emphasis supplied.) (R. 192.)

The Tax Court also considered the decedent's prior gift making policy. (R. 306.) The decedent did not customarily make large gifts. He had created a trust for the benefit of his sons in 1935 (R. 34), but otherwise made no gifts except for a $25 check for each, yearly at Christmas (R. 127) and gifts to each grandchild of approximately $1,500 per year. (R. 128.) The decedent made no other gifts prior to the transfer in excess of $2,000,000 of Aeon stock. The Tax Court, thus correctly found that the transfer of Aeon stock could not be considered part of a pattern of life time gift giving.

The decedent did, however, make two other transfers to his sons subsequent to the gift of Aeon stock. Approximately four months after the gift of Aeon stock, on April 27, 1964, the decedent gave each of his sons certain Alabama mineral interests as well as $3,025 in cash. On August 27, 1965, the decedent gave each son a one-third interest in Texas property. (Ex. B, C.) In each case the decedent gave each son one-third. The same pattern of distribution is generally apparent in the decedent's will.[5/] The primary provision creates a trust for the benefit of each son, and his family. (R. 224, Article Eighth.) While it is true, as the taxpayer contends (Br. 47), the ultimate remaindermen are the decedent's great-grandchildren, nevertheless, the immediate income beneficiaries are the decedent's sons and their families. Both the timing and proportion of the Aeon stock transfer indicate its testamentary nature, particularly when viewed in light of the decedent's lack of prior gift making, as well as the fact that he maintained a rather substantial control over the full enjoyment of the gift during his own life by virtue of his retention of a controlling interest in the corporation itself.[6/]

5/ There is a specific provision in the decedent's will which would have accomplished the same result at his death. (R. 221.) Article Fifth (b), provides for the equal division among his sons of the decedent's mineral and real property interests which was, as the taxpayer states, virtually worthless at his death (Br. 45).

6/ Indeed, the decedent's retention of a controlling interest in Aeon further insured that it would be the testamentary trust, and not the individual recipients of the Aeon shares, which would continue to effectively control the corporation, and thereby limit the sons' ability to fully enjoy the value of their individual minority interests without constraint. Thus, while taxpayer attempts to rely on such retained control as a factor tending to show life motives for the transfer (Br. 36), we submit that it really supports the Tax Court's finding that his gift was, in fact, testamentary in nature.

Finally, the taxpayer's reliance (Br. 47-48) on Lockwood v. United States, 181 F. Supp. 748 (S.D.N.Y., 1959), is plainly misplaced. The question whether the taxpayer has established by a fair preponderance of the evidence that the transfer was primarily motivated by considerations other than the thought of death is one for the fact finder to decide. In Lockwood, the fact finder made such a finding, based on a strong showing that the decedent's desire to avoid income taxes constituted his dominant motive. Indeed, the court there specifically indicated that but for such showing, such factors as the decedent's age, his ill health, and the identity of the donees (i.e., the natural objects of his bounty) would have compelled a contrary conclusion. Id., p. 751. The fact finder's conclusion based on the unique circumstances found to be involved in Lockwood is, thus, hardly authority for reversing the Tax Court's contrary finding on the entirely different circumstances of the instant case. Clearly, all the facts and circumstances of each particular case must be considered by the fact finder. Moreover, like the question of intent presented in Commissioner v. Duberstein, 363 U.S. 270 (1960), the question of motivation is one where the decision "must be based ultimately on the application of the fact finding tribunal's experience with the main springs of human conduct to the totality

of the facts of each case." 363 U.S., p. 289. And, as the Court there further noted:

> The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

Taxpayer here does not contend that the Tax Court applied an erroneous standard as to whether or not the transfer was within the purview of Section 2035. Rather, their quarrel is essentially with the weight ascribed by the Tax Court to the evidence presented by them in this regard.

However, in light of all the facts and circumstances surrounding the transfer of Aeon stock the Tax Court was fully warranted in finding that it was a gift in contemplation of death. Unless demonstrated to be clearly erroneous, that finding should not be disturbed. Commissioner v. Duberstein, supra. See Gillette's Estate v. Commissioner, 182 F. 2d 1010, 1014 (C.A. 9, 1950). The fact that competing motives for the transfer are urged does not change the standard of review. Bassett's Estate v. Commissioner, 170 F. 2d 917 (C.A. 2, 1948).

In short, the transfer of a substantial amount of property in accordance with his testamentary plan to the natural objects of his bounty by an 89 year old man believing himself to be in poor health, constituted a gift in contemplation of death within the meaning of Section 2035. It cannot be concluded on these facts that such a finding is clearly erroneous.

CONCLUSION

For the foregoing reasons the finding of the Tax Court is correct and should be affirmed.

Respectfully submitted,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
GARY R. ALLEN,
WYNETTE J. HEWETT,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530.

JANUARY, 1975.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 7th day of March, 1975, in an envelope, with postage prepaid, properly addressed to him as follows:

Robert D. Whoriskey, Esquire
100 Wall Street
New York, New York 10005

Gilbert E. Andrews

GILBERT E. ANDREWS,
Attorney.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) [as amended by Sec. 18(a)(2)(c), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960] General rule.--The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) Application of General Rule.--If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2035-1 Transactions in contemplation of death.

* * *

(c) Definition. The phrase "in contemplation of death", as used in this section, does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.